Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SAM WRIGHT, JR.,
Petitioner,

v.

FEDERICO PEÑA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED

1. Whether decisions, in this consolidated Title VII complaint filed by Petitioner, Pro Se, (issued by the district court and upheld by the Court of Appeals) without compelling discovery or requiring an answer to the complaint, are in conflict with the decisions of other Courts of Appeals and decisions of this Court. The decisions are as follows: (a) dismissing Counts I, II and V as untimely, (b) dismissing Counts III, VI, VII, VIII, IX, XI, XIII, XIV, XV, XVII as allegations not covered by the Civil Rights Act of 1964, as amended, (c) dismissing Count XII under settled authority, and (d) dismissing Count XVI because Petitioner did not allege that he applied for the position.

2. Whether it was error and an abuse of discretion for the district court to (a) refuse to compel Respondent to provide answers to Petitioner's discovery requests, (b) postpone the ruling on Petitioner's motion to compel discovery until after the district court heard and ruled on Respondent's motion to dismiss, and (c) fail to require that the answers to discovery provided by Respondent be refiled under oath.

3. Whether the decision by the district court to grant Respondent's Rule 56 summary judgment motion on Counts IV and X of the complaint was error and in conflict with the decisions of other Courts of Appeals and the decisions of this Court.

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The Petitioner, Sam Wright, Jr., Pro Se, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Court of Appeals decision denying Petitioner's request for rehearing is reproduced in the Appendix, pp. 8a and 9a. The unpublished opinion of the Court of Appeals is reproduced in the Appendix, pp. 5a to 7a. The District Court's decisions are reproduced in the Appendix, pp. 1a to 4a.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on March 5, 1997 (Appendix, pp 5a to 7a.). Petitioner filed a petition for rehearing. On April 29, 1997, the petition for rehearing was denied (Appendix, pp 8a and 9a.). This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides, in pertinent part:

"The right of the people to be secure in their persons, . . . against unreasonable searches and seizures, shall not be violated . . . "

The relevant provisions of the Age Discrimination in employment Act of 1967 and 29 U.S.C. §§ 621, 623 and 633 are reproduced at Appendix, pp. 12a and 13a. The relevant provisions of Title VII of the Civil Rights Act of 1964, as

amended, and 42 U.S.C. § 2000e are reproduced in the Appendix, pp. 10a and 11a.

5 U.S.C. § 6307 reads in pertinent part:

"An employee is entitled to sick leave with pay which accrues on the basis of one-half day for each full biweekly pay period."

Rule 12(b)(6) of the Federal Rules of Civil Procedure reads in pertinent part:

"Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . failure to state a claim upon which relief can be granted . . . "

Rule 33 of the Federal Rules of Civil Procedure reads in pertinent part:

"Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable."

Rule 36 of the Federal Rules of Civil Procedure reads in pertinent part:

"Unless the court determines that an objection is justified, it shall order that an answer be served."

Rule 37 of the Federal Rules of Civil Procedure reads in pertinent part:

(c)(1) "A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed."

The relevant provisions of Rule 26 of the Federal Rules of Civil Procedure are reproduced in the Appendix, p. 15a. The relevant provisions of Rule 56 of the Federal Rules of Civil Procedure are reproduced in the Appendix, p. 16a.

STATEMENT OF THE CASE

Petitioner, Sam Wright, Jr., Pro Se, filed a seventeen count verified consolidated complaint in the United States District Court for the Eastern District of Virginia, Alexandria Division, alleging (1) hostile work environment, (2) retaliatory decisions in employment, inhibition of litigation vindicating civil rights, (3) inhibition of assistance of litigation vindicating civil rights, (4) sex, race, age discrimination, and (6) unreasonable search and seizures. In violation of the Fourth Amendment to the United States Constitution, the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., and 29 U.S.C. § 621 et seq. The district court had jurisdiction under the provisions of 28 U.S.C. § 1331, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., the Age Discrimination in Employment Act of 1967, as amended, and 29 U.S.C. §§ 623 and 633. The complaint is supported by the Petitioner's certification in accordance with 28 U.S.C. § 1746(2).

Petitioner is an active and outspoken member of the Respondent's workforce, who engages in activities designed to ensure freedom from discrimination. He has a history of reporting discriminatory incidents involving management officials, filing EEO complaints, and counselling and aiding other employees in EEO matters. Exhibits attached to the complaint show that management officials have referred to Petitioner as: (1) "an intelligent man who has a tendency exercising energy into champion causes which could be channeled into more positive cases," (2) a person that "challenges authority which irritates some people," and (3) "a troublemaker who is constantly challenging management." In the complaint, Petitioner alleges (with supporting exhibits) that the Respondent systematically engaged in efforts to intentionally inflict severe emotional distress upon Petitioner and took continuous adverse employment actions against him

because of impermissible considerations of sex, race, and age, and retaliated against Petitioner because of his civil rights activities.

Petitioner propounded his first discovery request and Respondent filed objections to eighteen (18) of the twenty-three (23) interrogatories, one hundred and forty two (142) of the one hundred and forty six (146) requests for production of documents and things, and generally objected to the request for admissions. Petitioner propounded his second discovery request and Respondent filed objections to forty three (43) of the fifty eight (58) requests for production of documents and generally objected to the request for admissions.

After Petitioner served the Respondent with his discovery requests, Respondent filed two motions. The Respondent filed one motion for a protective order and to stay discovery and a second motion to dismiss the complaint, or in the alternative for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Respondent's dispositive motion was not supported by a sworn declaration. The district court denied the motion for a protective order and to stay discovery.

Petitioner filed a motion to compel discovery and to postpone the hearing on the motion to dismiss or in the alternative for summary judgment. The district court denied Petitioner's motion to postpone the hearing on the Respondent's motion to dismiss and took the motion to compel under advisement until after the hearing on the motion to dismiss, or in the alternative for summary judgment.

On January 4, 1996, the district court heard the Respondent's unsupported motion to dismiss, or in the alternative for summary judgment. The district court dismissed all counts of the complaint except Counts 4 and 10 and granted leave to amend Count 16. The Respondent's motion for summary judgment as to Counts 4 and 10 was denied as premature.

After hearing Respondent's motion to dismiss, or in the alternative for summary judgment, the district court denied Petitioner's motion to compel discovery. The Respondent subsequently filed a second Rule 56 motion for summary judgment as to Counts 4 and 10. The district court granted summary judgment as to Counts 4 and 10 and dismissed Count 16. Petitioner's suit was dismissed. In a per curiam decision, the Court of Appeals affirmed the decisions of the district court.

REASONS FOR GRANTING THE PETITION

1. On a motion to dismiss a verified complaint along with its exhibits must be treated as an affidavit and a plaintiff must be given reasonable discovery.

Verified complaint must be treated as an affidavit.

In Count 5 Petitioner alleges that he learned, during a 1992 conversation with a white coworker, (1) that the white coworker was treated differently regarding requests for medical records, and that Petitioner had been discriminated against in 1987, (2) that female and white employees are treated differently than Petitioner, (3) that the Agency violated Petitioner's rights under the Fourth Amendment to the United States Constitution, and (4) that the Agency's actions were based on impermissible considerations of sex, race and civil rights activities. It was impossible for Petitioner to pursue this matter in 1987 because Petitioner was not aware that the Agency treated him differently than it treated whites or females. Petitioner had no basis in 1987 for a charge of discrimination. Attached to the complaint as an exhibit is Petitioner's timely filed EEO complaint, which was accepted by the Agency.

The district court, pursuaded by government counsel's assertion that Petitioner had the opportunity in 1987 to pursue the matters contained in this count, dissmissed this count as untimely. The Respondent did not present any facts showing that Petitioner could have learned in 1987 of the difference in treatment between him and the white coworker. The district court's decision that this count is untimely because Petitioner had the opportunity to pursue the allegations in 1987 is in conflict with other Courts of Appeals and the decisions of this Court. Chevron U.S.A., Inc. v. U.S., 923 F.2d 830, 834 (Fed.Cir.1991); Richards v. Mileski, 662 F.2d 65, 69, 71 (D.C.Cir.1981) (the statues are tolled until the plaintiff, employing due diligence, could have discovered the facts that were fraudulently concealed ... defendant has the burden of coming forward with any facts showing that the plaintiff could have learned of the concealment using due diligence); Fitzgerald v. Seamans, 553 F.2d 220, 228 (D.C.Cir.1977) (tolling doctrine tends to obviate the danger that dismissed government employees will rush to litigation on bare suspicion that superiors acted in bad faith.); Kern v. Hettinger, 303 F.2d 333 (2nd Cir.1962); Wayne v. Tennessee Valley Authority, 730 F.2d 392, 401-402 (5th Cir.1984); Sperry v. Barggren, 523 F.2d 708, 710 (7th Cir.1975); Winkelman v. Blyth & Co., Inc., 518 F.2d 530 (9th Cir.1975); Alexander v. Beech Aircraft Corp., 952 F.2d 1215, 1218 (10th Cir.1991); Eddings v. Volkswagenwerk, A.G., 835 F.2d 1369, 1371-72 n. 2 (11th Cir); Bailey v. Glover, 88 U.S. (21 Wall.) 342, 348, 349-350 (1874) (without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered . . . the limitations period does not begin to run until plaintiff discovers his cause of action when the fraud has been concealed or is such character as to conceal itself.); Wood v. Carpenter, 101 U.S. 135, 143 (1879); Holmberg v. Armbrecht, 327 U.S. 392, 396-397, 66 S.Ct. 582, 90 L.Ed. 743.

In Count 1 Petitioner alleges unreasonable search and seizure, a hostile work environment, retaliatory decisions in employment, and sex, race, and age discrimination by the Agency. Exhibit 69, attached to the complaint, shows that Count 1 is based on an Equal Employment Opportunity (EEO) complaint timely filed on August 5, 1992. Said EEO complaint was accepted by the Agency. Petitioner names specific white and female individuals who were treated differently.

In Count 2 Petitioner alleges that the Agency, through a series of events, inhibited the assistance of litigation vindicating civil rights and that female and white employees are treated differently than Petitioner. Exhibit 69, attached to the complaint, shows that Count 2 is based on an EEO complaint timely filed on August 5, 1992. Said EEO complaint was accepted by the Agency.

The district court was pursuaded by government counsel's unsupported assertions, in the motion to dismiss, that Counts 1 and 2 are untimely because both counts are based on a 1991 EEO complaint which was dismissed by the agency and the Agency's dismissal of the 1991 EEO complaint was subsequently affirmed by the EEOC in April, 1992.

The district court did not treat petitioner's verified complaint, with attached exhibits, and his verified pleadings, with attachments or exhibits, as an affidavit. Taking as true the allegations in the complaint and treating Petitioner's verified complaint, with exhibits, as an affidavit, Counts 1, 2 and 5 are timely filed. The district court's decision to accept government counsel's unsupported assertions and dismiss counts without treating Petitioner's verified complaint, with exhibits, as an affidavit, is in conflict with the D.C., First, Third, Fifth, Seventh, and Ninth Circuits. Each of these Courts of Appeals has faced this issue and each has treated verified complaints, with attached exhibits, as acceptable opposition. Neal v. Kelly, 963 F.2d 453, 457 (D.C.Cir.1992);

Sheinkopf v. Stone, 927 F.2d 1259, 1262 (1st Cir.1991); Pollack v. City of Newark, N.J., 147 F.Supp. 35, 39 (D.N.J.1956), aff'd, 248 F.2d 543 (3rd Cir.1957); Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 80 (5th Cir.1987); Hooks v. Hooks, 771 F.2d 935, 945 (6th Cir.1985); Carroll v. Sielaff, 514 F.2d 415, 417 (7th Cir.1975); McElyea v. Babbitt, 833 F.2d 196, 197-98 (9th Cir.1987).

Petitioner must be given reasonable discovery.

After Petitioner received the Respondent's objections to his first set of interrogatories, request for production of documents and request for admissions, Petitioner telephoned government counsel to discuss those objections. Government counsel was not prepared to discuss the objections. Government counsel agreed to telephone Petitioner when government counsel was ready to discuss the objections. Government counsel did not telephone Petitioner or make a good faith attempt to overcome any alleged objections to Petitioner's discovery request prior to the district court ruling on Petitioner's motion to compel. Instead, government counsel filed a motion to dismiss. The Respondent did not establish that a good faith attempt had been made to overcome any alleged objections to discovery requests.

The Respondent filed general objections to Petitioner's discovery requests. The district court did not determine that the government's objections to request for admissions were justified.

Petitioner received parts of documents instead of entire documents. Petitioner received documents that are completely illegible. Petitioner requested that specific documents be identified and produced and the response given was to refer Petitioner to a file. Respondent refused Petitioner access to necessary documents and as a result, Petitioner was unable to identify necessary witnesses.

Respondent's answer to one interrogatory was that Respondent was unable to consult with the affiant of a document because the affiant was retired from the Agency. During the hearing on Petitioner's motion to compel, the Petitioner supplied the district court and the Respondent with evidence that the Respondent's answer to the interrogatory is incorrect and incomplete because the affiant is in fact employed by the Agency in its Headquarters building. Respondent did not correct the response or serve Petitioner with a supplemental response.

Petitioner requested a complete copy of his Agency medical record. The documents supplied in response to this request were not copied from Petitioner's medical file. After Petitioner received the documents (purported to be a copy of Petitioner's medical file) from the government, Petitioner consulted the two Agency persons responsible for maintaining Petitioner's medical records and was told that his medical file had not been copied. Petitioner supplied the district court with an affidavit to this effect.

Petitioner did not have reasonable discovery and was denied discovery which relates to the Respondent's dispostive motion. The statement used by the Respondent to certify the answers to Petitioner's interrogatories does not include the necessary "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date)" as required by 28 U.S.C. § 1746. Rule 33 of the Federal Rules of Civil Procedure requires that answers to interrogatories be under oath.

Respondent failed to surmount the threshold burden to establish that no discovery is needed to resolve the motion to dismiss. The district court's decisions to take Petitioner's motion to compel discovery under advisement until after the Respondent's dispostive motion was heard and to refuse to compel Respondent to provide answers to Petitioner's discovery requests are in conflict with the Federal Rules of Civil Procedure, other Courts of Appeals and the decisions of

this Court. Landry v. Airline Pilots Ass'n International, AFL-CIO, 901 F.2d 404, 435 (5th Cir. 1990); Federal Rules of Civil Procedure 12(b)(6). General objections are not useful to any court in ruling on a discovery motion, nor does a general objection fulfill a party's burden to explain its objections. General Dynamics Corp. v. Selb Manufacturing Co., 481 F.2d 1204, 1212 (8th Cir. 1974), cert, denied, 414 U.S. 1162, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974), quoting from Wright & Miller, Federal Practice and Procedure, Civil Section 2035 at 264-265. "Although the district court has broad discretion to stay discovery pending the decision on a dispositive motion, it is abuse of that discretion, however, to stay general discovery if Petitioner has been denied discovery which relates to the dispostive motion." Hoverdale v. School Bd. of Hillsborough County, 128 F.R.D. 287, 289 (M.D.Fla. 1989), quoting, Scroggins v. Air Cargo, Inc., 534 F.2d 1124, 1133 (1976); Wade v. Johnson Controls, Inc., 693 F.2d 19, 22 (2nd Cir.1982) (dismissal of a complaint before discovery is a drastic step. It is a device that must not be employed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief . . . that the appellants are unlikely to prevail does not justify denying them an opportunity to litigate their claims.); Havenfield Corporation v. H & R Block, Inc., 509 F.2d 1263, 1272 (8th Cir.1975) (amendments to interrogatory answers are mandated by the Federal Rules of Civil Procedure and are to be made seasonably.); Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1011 (2nd Cir.1986) (it was improper for the district court not to compel discovery on the issues in defendant's motions.); Herbert v. Lando, 441 U.S. 153, 177 (1979); Schlagenhauf v. Holder, 379 U.S. 104, 114-115 (1964); Hickman v. Taylor, 329 U.S. 495, 501, 507 (1947) (the court has more than once declared that the deposition-discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials . . . to this end, the requirement of Rule

26(b)(1) that the material sought in discovery be relevant should be firmly applied, and the district courts should not neglect their power to restrict discovery where justice requires protection for a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . with this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process.); Conley v. Gibson, 355 U.S. 41, 47 (1957) (such simplified notice pleading is made possible by the liberal opportunity for discovery); United States v. 58.16 Acres of Land, Etc., Clinton Cty., Ill., 66 F.R.D. 570, 572, 573 (1975); "Since interrogatories as answered by United States attorney were not answered under oath, the answers would have to be refiled under oath in view of rule."; Rule 33 of the Federal Rules of Civil Procedure; "Unless the court determines that an objection is justified, it shall order that an answer be served." Rule 36(a) of the Federal Rules of Civil Procedure. The privileges claimed by Respondent in the objections to Petitioner's discovery requests are insufficient because the documents to which the privilege applies is not identified therefore, the privilege is waived. Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540, 541-42 (10th Cir. 1984), Davis v. Fendler, 650 F.2d 1154, 1160 (9th Cir 1981).

2. Allegations of discrimination which occur during pendency of proceedings before the EEOC and are subsequently included in an action brought pursuant to equal employment provision must not be dismissed because those allegations have not been presented to the EEOC.

The incidents that form the basis for the allegations in Counts 11 and 13 occured during the pendency of proceedings before the EEOC and were subsequently included in this action brought against the Respondent pursuant to equal employment provision. The district court

stated that Counts 11 and 13 should be dismissed because they had not been presented to the EEOC. The district court's decision that these counts must first be brought before the EEOC is in conflict with other Courts of Appeals and the decisions of this Court. Seven other federal circuits and this Court have held that the exhaustion doctrine is not an automatic bar to judicial review. Oglesby v. U.S. Dept. Of Army, 920 F.2d 57, 61 (D.C.Cir.1990); Earnhardt v. Commonwealth of Puerto Rico, 691 F.2d 69, 71 (1st Cir.1982); Smith v. American President Lines. Ltd., 571 F.2d 102, 108-111 & n.12 (2nd Cir.1978); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394 (3rd Cir.1976); Gamble v. Birmingham So. R. R. Co., 514 F.2d 678 (5th Cir.1975); Cox v. United States Gypsum Co., 409 F.2d 289, 290-291 (7th Cir.1969); E.E.O.C. v. Occidental Life Ins. Co., 535 F.2d 533 (9th Cir.1976), aff'd, --- U.S. ---, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977); Johnson v. United States Postal Service, 861 F.2d 1475, 1481 (10th Cir.1988); McKart v. United States, 395 U.S. 185, 199, 200-201 (there is simply no overwhelming need for the court to have the agency finally resolve this question in the first instance . . . no case decided by this court stands for the proposition that the exhaustion doctrine must be applied blindly in every case.).

3. The rulings dismissing some counts of the complaint and granting summary judgment on Counts 4 and 10 conflict with decisions of every other federal circuit and stems from a failure to follow decisions of this Court.

Decision to dismiss counts of the complaint is in conflict with decisions of every other federal circuit and stems from a failure to follow decisions of this Court.

In Count 3 Petitioner alleges that the Agency unwarrantingly terminated his access to reference materials containing EEO laws and regulations and required him to submit a request for the information he was seeking and then did not honor his request for the EEO regulations and reference material. Petitioner alleges that the Agency's actions were (1) to inhibit vindication of his civil rights, (2) to retaliate against Petitioner for his involvement in civil rights activities, (3) based on impermissible considerations of sex, race and civil rights activities. Petitioner names specific white males and females who have been treated differently.

In Counts 8, 11 and 13 Petitioner alleges that he requested documents from the Agency to assist in the vindication of civil rights; that the Agency refused to locate and/or provide the requested documents in order to retaliate against him for his involvement in EEO activities and to inhibit his litigation vindicating his civil rights; that the Agency treats white and female employees differently; and that the Agency's actions are based on impermissible considerations of sex, race and civil rights activities.

In Count 6 Petitioner alleges that, in spite of due diligence by Petitioner, the Respondent fraudulently concealed documentation and that the active misconduct on the part of the Respondent had a detrimental effect on Petitioner's vindication of his civil rights, and that Respondent's actions were based on impermissible considerations of sex, race and civil rights activities. The district court dismissed this count stating that in the Court's view, it falls within the category of decisions that are not covered by Title VII.

Six Courts of Appeals and this Court have held to the contrary regarding the allegations of fraudulent concealment. "Should active concealment be found, then the statute is tolled until actual discovery . . . If no active concealment is present, then the issue becomes whether knowledge of the alleged fraud could reasonably have been acquired before

[the date plaintiff claims the statute began to run], with the exercise of due care . . . These are issue of fact." Sperry v. Barggren, 523 F.2d 708, 711 (7th Cir.1975). The D.C., First, Second, Eighth and Tenth Circuits have endorsed this view. In Bailey v. Glover, 88 U.S. (21 Wall.) 342, 348, 22 L.Ed. 636 (1874), this Court wrote that where a party injured by another fraudulent conduct

> remains in ignorance . . . without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.

The district court decided that the allegations in Counts 3, 6, 8, 11, and 13 are not covered by Title VII under the governing law in the Fourth Circuit. The D.C., Second, Fifth, Eighth, Ninth, and Tenth Circuits, and this Court have held to the contrary. Hobson v. Wilson, 737 F.2d 1 (D.C.Cir.1984); Christman v. Skinner, 468 F.2d 723 (2nd Cir.1972); Familias Unidas v. Briscoe, 619 F.2d 391, 398-99 (5th Cir.); Norbeck v. Davenport Community School Dist., 545 F.2d 63, 67 (8th Cir.1976); Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796 (9th Cir.1982); Ownes v. Rush, 654 F.2d 1370, 1379 (10th Cir.1981); NAACP v. Alabama, 357 U.S. 449, 462 ("freedom to associate and privacy in one's associations"); Griswold v. Connecticut, 381 U.S. 479; Kusper v. Pontikes, 414 U.S. 51, 56-57; NAACP v. Button, 371 U.S. 415, 430; Board of Education v. Barnette, 319 U.S. 624; DeJonge v. Oregon, 299 U.S. 353; Elrod v. Burns, 427 U.S. 347, 359; Perry v. Sindermann, 408 U.S. 593, 597; Ex parte Hull, 312 U.S. 546, 61 S.Ct. 640 (1941) (so, too, is action taken to intimidate prisoners from initiating legal action); Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747 (1969) (correctional officials may not obstruct or unreasonably

restrict prisoners in their efforts to obtain judicial relief); In Re Primus, 436 U.S. 412, 426, 431, 98 S.Ct. 1893, 1901, 1904; Harris v. Forklift Systems, Inc., 114 S.Ct. 367, 370 (the phrase "terms, conditions, or privileges of employment" evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.).

In Count 7 Petitioner alleges (1) that at 4:15 p.m. he requested sick leave starting at 5 p.m.; (2) that Agency management did not approve his request for sick leave; (3) that Agency management does not fail to approve sick leave for white and female employees; and (4) that the Agency's actions were based on impermissible considerations of sex, race and civil rights activities. The district court also decided, at the dismissal stage, that the delay in the Agency's granting of sick leave to the Petitioner "is de minimis in the context." The district court weighed evidence and tried this issue at the dismissal stage. At the dismissal stage, it is improper to weigh evidence and try issues. It is only proper to determine if there are issues to be tried.

The taking of sick leave is a matter of right and a privilege of employment covered by 5 U.S.C. § 6307. The district court dismissed this count stating that the granting of sick leave falls into a category not covered by Title VII. The district court's decisions to weight evidence and try this issue, at the dismissal stage, and to dismiss this count are in conflict with the Ninth Circuit and decisions of this Court. Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1491 (9th Cir.1995) (it is unlawful ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.); Harris v. Forklift Systems, Inc., 114 S.Ct. 367, 370 (the phrase "terms, conditions, or privileges of employment" evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.); Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399

(1986); Los Angeles Dept. of Water and Power v. Manhard, 435 U.S. 702, 707, n. 13, 98 S.Ct. 1370, 1374 (1978).

In Counts 9 and 17 Petitioner alleges (1) that he requested to speak with members of Agency management regarding improper decisions by subordinate managers, (2) that Agency management willfully refused to provide him the opportunity to seek corrective action for inappropriate management behavior, (3) that whites and females are treated differently (specifically identifying two employees by name), and (4) that the Agency's actions were based on impermissible considerations of sex, race and civil rights activities.

The district court dismissed Counts 9 and 17 stating that the allegations contained in these two counts do not fall under the protection of Title VII. Contrary to the decision of the district court, the D.C., Second, Ninth and Tenth Circuits have held that when government officials fail to control behavior of subordinate employees, they ratify unreprimanded conduct and create a de facto departmental policy. Also, at some point the actions of a superviosr at a sufficiently high level in the hierarchy would necessarily be imputed to the agency and employer negligence in this context is defined as failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known. Barnes v. Costle, 561 F.2d 983, 993 (D.C. Cir.1977); Kotcher v. Rosa & Sullivan Appliance Center, Inc., 957 F.2d 59, 64 (2nd Cir.1992); EEOC v. Hacienda Hotel, 881 F.2d 1504, 1516 (9th Cir.1989); Hirschfeld v. New Mexico Corrections Dept., 916 F.2d 572, 577 (10th Cir.1990).

In Count 16 Petitioner alleges (1) that the Agency promoted a white male, (2) that Petitioner was more qualified for the position than the white male, (3) that Petitioner was not fairly considered for the position because of impermissible considerations of sex, race and civil rights

activities. The district court granted leave to amend Count 16 if Petitioner could allege that he applied for the position.

Petitioner submited a verified response to Respondent's dispositive motion. The response is supported by the Petitioner's certification in accordance with 28 U.S.C. § 1746(2). In that response, Petitioner stated that he had no way of knowing that the agency was going to make such a promotion. Therefore, he could not apply for the job in question. The government did not offer any evidence that Petitioner was not more qualified than the person selected or should have known about the position. Petitioner alleges that he is a member of a protected class who is qualified for an available position, but was not considered under circumstances giving rise to an inference of unlawful discrimination. After Petitioner did not file an amended complaint alleging that he applied for the position, the district court dismissed this count. The district court did not treat Petitioner's verified complaint or verified pleading as an affidavit.

The district court's decision to dismiss this count because Petitioner did not allege that he applied for the position is in conflict with the Fifth and Ninth Circuits and decisions of this Court. Hailes v. United Air Lines, 464 F.2d 1006, 1009 (5th Cir.1972) (complaint of sex discrimination need not allege that plaintiff actually applied for and was rejected for a job); Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1492 (9th Cir.1995), citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 259 the Court said, "A district court's finding that a Title VII plaintiff's qualifications were clearly superior to the qualifications of the applicant selected is a proper basis for a finding of discrimination." International Brotherhood of Teamsters v. United States, 97 S.Ct.1843, 52 L.Ed.2d 396 (1977) (failure of an incumbent employee to formally apply for a job does not constitute a per se barrier to relief.) See citations regarding verified pleadings

under **Verified complaint must be treated as an affidavit** *supra*.

In Count 12 Petitioner alleges (1) that he has been verbally abused by white employees, (2) that he reported the verbal abuse to management and management failed to take any corrective measures, (3) that management condones white employees ridiculing black employees, and (4) that the Agency's actions are based on impermissible considerations of sex, race and civil rights activities. This count was dismissed because the district court decided that one instance of verbal abuse does not constitute a violation. However, Petitioner alleges that he has been abused by white employees and that management condones such abuses. The word employees indicates abuse by more than one employee, thus, more than one instance of verbal abuse.

In Count 14 Petitioner alleges (1) that Agency management refused to provide him with information necessary to do his work, (2) that Agency management's actions had the effect of unreasonably interfering with his work performance, (3) that Agency management does not refuse to provide white and female employees with information necessary to do their work, and (4) that the Agency's actions were based on impermissible considerations of sex, race and civil rights activities. The district court dismissed this count reasoning that the allegations do not have an immediate effect on employment conditions and therefore, the allegations in this count are not covered by Title VII.

In Count 15 Petitioner alleges (1) that Agency management removed personal property from his briefcase without permission, (2) that white and female employees are treated differently, and (3) that Agency management's actions were based on impermissible considerations of sex, race and civil rights activities. The district court dismissed this count ruling that management's removal of personal property from Petitioner's briefcase without permission is not an ultimate

personnel decision and therefore not covered by Title VII. The district court applied the wrong standard in dismissing Counts 12, 14, and 15 and its decisions are in conflict with decisions of every other Court of Appeals and the decisions of this Court.

Every other circuit and this Court has held that dismissal of a complaint (in this case Counts 1, 2, 3, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16 and 17 of the complaint) is not justified unless it appears beyond doubt that Petitioner could prove no set of facts in support of his claims. Hobson v. Wilson, 737 F.2d 1 (D.C.Cir.1984); Fisher v. Flynn, 598 F.2d 663, 665 (1st Cir.1979); Wade v. Johnson Controls, Inc., 693 F.2d 19, 22 (2nd Cir.1982); Bryson v. Brand Insulations, Inc., 621 F.2d 556, 559 (3rd Cir.1980); Sims v. Adams, 537 F.2d 829, 831 (5th Cir.1976); Place v. Shepherd, 446 F.2d 1239, 1244 (6th Cir.1971); Altman v. Hurst, 734 F.2d 1240, 1242 (7th Cir. 1984); Thomas W. Garland, Inc. v. City of St. Louis, 596 F.2d 784, 787 (8th Cir.); Sherman v. Yakahi, 549 F.2d 1287, 1290 (9th Cir.1977); Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir.1981); Conley v. Gibson, 355 U.S. 41, 45-46, 47-48 (allegations of the complaint cannot be dismissed for failure to state a claim unless it is clear that plaintiff can prove no set of facts entitling him to relief); Estelle v. Gamble, 429 U.S. 97, 105, 97 S.Ct. 285, 292 (1976); Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct. 1843 (1969) (on motion to dismiss, material allegations of the complaint are taken as admitted and the complaint is to be liberally construed in favor of the plaintiff.); Haines v. Kerner, 404 U.S. 519, 520-521, 92 S.Ct. 594, 596 (we cannot say with assurance that under the allegations of the *pro se* complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.); Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686 (indeed it may appear on the face of the pleadings that a recovery is very remote and

unlikely but that is not the test . . . the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support his claims.).

Granting summary judgment on Counts 4 and 10 conflicts with the decisions of every other federal circuit and stems from a failure to follow decisions of this Court.

The district court denied dismissal on Counts 4 and 10 and then denied Respondent's first summary judgment on those counts reasoning that Respondent's motion for summary judgment was premature. Rule 56(b) of the Federal Rules of Civil Procedure states:

> For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

Respondent could file a motion for summary judgment at any time after Petitioner filed the verified complaint and the motion would not be premature.

Respondent filed a second Rule 56 motion for summary judgment, which was supported by affidavits, on Counts 4 and 10 and was awarded summary judgment.

Petitioner requested discovery from the Respondent on each of the issues in each of the counts in the complaint. Respondent objected to the majority of the discovery requests as "overly broad, burdensome, and irrelevant." The Agency argued that after Petitioner was medically disqualified from performing air traffic control dutes that he was transferred to the Data Systems Coordinator (DSC) position because the DSC position was the only staff position that did not require medical certification. Petitioner alleges that his medical

disqualification was wrongful, that the DSC position is a dead end position, that the DSC position is not the only staff position that did not require medical certification, and that the Agency's actions were based on impermissible considerations. Four Agency staff position descriptions (Military Operation Specialist, Plans and Programs Specialist, Airspace and Procedures Specialist, and Quality Assurance Specialist) attached to the complaint as exhibits, clearly establish that the DSC position was not the only position that did not require a medical certification. None of the four staff position descriptions indicate that a medical certification is required for the position. The Agency's own position descriptions controvert the assertions made in the affidavits used to support the second motion for summary judgment that the DSC position was the only position which did not require a medical certification. In the verified complaint, Petitoner alleges by name white males who were medically disqualified and were assigned to staff positions other than the DSC position.

Petitioner also alleges in Count 4 that Agency civil rights personnel did not conduct a fair and unbiased review of Agency management's transfer of Petitioner to the DSC position. An unfair and biased review of the Agency management decision to transfer Petitioner does not fulfill the requirement of Agency regulations or Due Process.

In Petitioner's request for production of documents, Petitioner requested that the Respondent provide a copy of the Agency regulation which governs the coordination process required with the Office of Civil Rights concerning Petitioner's transfer to the DSC position. The Respondent responded to the request by citing "overbroad, unduly burdensome and irrelevant" as the objection. Respondent did not provide the requested document.

In the second motion for summary judgment, the Respondent submitted affidavits which state that the coordination required with the Office of Civil Rights had

been accomplished as required by Agency regulation. The coordination required by Agency regulations in Count 4 must be with the EEO Officer. The FAA has many field EEO Officers but it has only one EEO Officer as defined by Agency regulations. Statements in the affidavits do not establish anyone of the affiantsas being the Agency's EEO Officer, as defined in Agency regulations, with whom coordination is required. Further, Rule 37(c)(1) of the Federal Rules of Civil Procedure prevents the Respondent from using as evidence information that addresses the Agency accomplishing coordination as required by the Agency regulation that Respondent objected to and subsequently refused to provide to Petitioner.

While issuing the decision from the bench on the Respondent's second motion for summary judgment, the district court said that Petitioner "offered no evidence" to rebut Respondent's evidence. Petitioner filed a total of six verified pleadings with one hundred and seventy four (174) exhibits. Each of Petitioner's verified pleadings was supported in accordance with 28 U.S.C. § 1746(2). Petitioner's verified complaint, with exhibits, and his verified pleadings, with exhibits, establish genuine issues as to the material facts. The district court did not treat any of Petitioner's verified pleadings, with attached exhibits, as affidavits.

The district court's granting of Respondent's second motion for summary judgment on Counts 4 and 10 is in conflict with other Courts of Appeals and decisions of this Court. Cronin v. Aetna Life Ins. Co., 46 F.3d 196, 202, 203 (2nd Cir.1995) (the inferences to be drawn from the underlying affidavits, exhibits, interrogatory answers, and depositions must be viewed in the light most favorable to the party opposing the motion . . . on a motion for summary judgment a court cannot try issues of fact; it can only determine whether there are issues to be tried . . . if there is any evidence in the record from which a reasonable inference

could be drawn in favor of the nonmoving party, summary judgment is improper.); Bryson v. Brand Insulations, Inc., 621 F.2d 556, 559 (3rd Cir.1980) (summary judgment inappropriate where material fact in dispute.); Blankenship v. Kerr County, Tex., 878 F.2d 893, 895 (5th Cir.1989) (summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."); First National Bank v. Insurance Company of North America, 606 F.2d 760, 766 (7th Cir.1979) (the moving party must present admissible evidence showing its entitlement to judgment, not just contentions, assertions of counsel, or hearsay.); Fed.R.Civ.P. 56(e) (on a motion for summary judgment the court may only consider facts that would ordinarily be admissible at trial); Smith v. Gross, 604 F.2d 639, 641 (9th Cir.1979) (summary judgment is proper only where there is no genuine issue of any material fact or where, viewing evidence and inferences which may be drawn therefrom in the light most favorable to the adverse party, the movant is clearly entitled to prevail as matter of law.); James v. City Of St. Petersburg, Fla., 6 F.3d 1457, 1459 (11th Cir.1993) (motion for summary judgment will be granted only if moving party establishes absence of genuine dispute as to any material fact and that he is entitled to a judgment as a matter of law.); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986) (rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.); United States v. Diebold, 369 U.S. 654, 655, 82 S.Ct. 993, 994 (1962) (the facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favorable to plaintiff, as the party opposing the motion.); Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S.Ct. 486, 491 (1962). See citations regarding verified

pleadings as opposition in discussion under **Verified complaint must be treated as an affidavit,** *supra.*

Petitioner argued that the doctrine of *res judicata* prevents Respondent from filing a second motion for summary judgment on Counts 4 and 10 unless Respondent can show that newly discovered evidence materially changes the evidence in support of Respondent's position. Respondent made no such showing. Kithcart v. Metropolitan Life Ins. Co., 119 F.2d 497, 499-500 (C.C.A.Mo.) (all issues which could have been plead and proved deemed adjudicated.); Bennett v. Commissioner of Internal Revenue, 113 F.2d 837, 839-840 (C.C.A.Tex.) (parties and their privies are made to abide definitive and final judgments, and litigations are concluded . . . an issue once finally settled by judgment of court of competent jurisdiction remains settled.); C. Blousas-St. Landry Securites Co. v. United States, 66 F.2d 41,44, C.C.A.La.; Nachod & U.S. Signal Co. v. Helvering, 74 F.2d 164, 166, C.C.A.6; Nunnally Inv. Co. v. United States, Ct.Cl., 36 F.Supp. 332, 338, 339 (res judicata proceeds upon the principle that one person shall not a second time litigate with the same person precisely the same question, particular controversy, or issue which has been necessarily tried and finally determined upon its merits by a court of competent jurisdiction.); Montana v. United States, 440 U.S. 147, 153 (1979) (under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.); Cornwell v. County of Sac, 94 U.S. 351, 352 (1877); Allen v. McCurry, 449 U.S. 90, 94, (1980); Lawlor v. National Screen Service Corp., 349 U.S. 322, 326 (1955); Southern Pacific R. Co., v. United States, 168 U.S. 1, 48-49 (1897); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402-403, 60 S.Ct. 907, 917 (1940) (a judgment is res judicata in a second action upon the same claim between the same parties.).

The affidavits submitted with the second motion for summary judgment are insufficient to support the motion.

Affidavits must be based upon personal knowledge. The mere fact that managers state that a position is a career enhancing position in their affidavits does not establish their contention as fact because their unsupported claim is conclusory.

The affidavits also do not establish (a) why Petitioner was moved to a position in the plans and programs office, (b) that the Petitioner was moved to a position in the plans and programs office as a result of having held the DSC position, (c) how the affiant knows a promotion was offered to the Petitioner, (d) who offered the Petitioner a promotion, (e) how the affiant knows Petitioner turned down a promotion, (f) a basis in personal knowledge for the affiant's conclusory statements that the DSC position is a career enhancing position, (g) that anyone has been promoted as a result of having held the position of DSC (h) that the affiant promoted anyone as a result of that person having held the position of DSC, or (i) a basis for their claim that the DSC position is the "least stressful position" available. The affiants do not state that their claim is based on any authority or that any affiant possesses the required training or education to make such a determination.. The hearsay statements contained in the supporting affidavits are insufficient to support their conclusory claims. All of the above issues were part of the basis for the district court granting Respondent summary judgment on Counts 4 and 10.

The district court's decision to grant summary judgment on the basis of the statements (which are conclusory or which the affiant has not shown affirmatively that he is qualified to make) in the affidavits is in conflict with Circuits One through Ten and this Court's decision. Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir.1990); Kamen v. American Tel. & Tel., Co., 791 F.2d 1006, 1011 (2nd Cir.1986); Fowle v. C & C Cola, A Div. Of Itt-Continental Baking Co., 868 F.2d 59, 67 (3rd Cir.1989); Martin v. John W. Stone Oil Distributor, Inc., 819 F.2d 547,

549 (5th Cir.1987); Daily Press, Inc. v. United Press International, 412 F.2d 126, 133 (6th Cir.); First Nat. Bank Co., Etc. v. Insurance Co., 606 F.2d 760, 766 (7th Cir.1979); Cupples Co. Manufacturers v. National Labor R. Board, 106 F.2d 100 (8th Cir.1939); Blair Foods Inc. v. Ranchers Cotton Oil, 610 F.2d 665, 667 (9th Cir.1980); Luckett v. Bethlehem Steel Corp., 618 F.2d 1373, 1380 n. 7 (10th Cir.1980); Automatic Radio Manufacturing Co. v. Hazeline Research, Inc., 339 U.S. 827, 831, 70 S.Ct. 894, 896.

CONCLUSION

For each of the foregoing reasons, (1) the resolution of a severe conflict in the United States Courts of Appeals for the various circuits, and (2) because of the clear conflict with relevant decisions of this Court, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SAM WRIGHT,	)
	)
Plaintiff,	)
	)
v.	)Civil Action
	)95-1406-A
	)
FEDERICO PEÑA, SECRETARY DEPARTMENT OF TRANSPORTATION,	)
	)
Defendant.	)

ORDER

This matter comes before the Court on defendant's motion to dismiss or alternatively for summary judgment. For the reasons stated from the bench, the motion to dismiss is **GRANTED** in part and **DENIED** in part. Specifically:

1. The motion to dismiss Counts IV and X is **DENIED.**

2. The motion to dismiss all other counts is **GRANTED.**

3. Plaintiff has leave to amend Count XVI to allege that he applied for the position of Assistant Manager for Plans and Programs. Plaintiff is **DIRECTED** to file any such amended complaint by 5:00 p.m., January 15, 1996. Defendant is **DIRECTED** to file its answer or other responsive pleading by 5:00 p.m., January 22, 1996.

4. The motion for summary judgment is **DENIED** as to Counts IV and X and is **DENIED AS MOOT** as to all other counts.

The Clerk is directed to send copies of this Order to plaintiff and to all counsel of record.

s/
T. S. Ellis, III
United States District Judge

Alexandria, Virginia
January 4, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SAM WRIGHT,	)
	)
Plaintiff,	)
	)
v.	)Civil Action
	)95-1406-A
	)
FEDERICO PEÑA, SECRETARY DEPARTMENT OF TRANSPORTATION,	)
	)
Defendant.	)

ORDER

This matter comes before the Court on defendant's motion for summary judgment as to Counts IV and X, the only counts remaining in issue. The Court held a hearing on this matter on March 15, 1996 at 10:00 a.m. Plaintiff did not appear at this hearing, although the record reflects that defendant had given plaintiff proper and timely notice of the motion, his right to respond, the hearing date, and the

possible consequences of failure to respond. Accordingly, the Court proceeded to rule on the motion.

For the reasons stated from the bench, the motion for summary judgment **GRANTED** and the suit is **DISMISSED**.

Should plaintiff wish to appeal, written notice of appeal must be filed with the Clerk of this Court within 30 days of the date of this order.

The Clerk is directed to send copies of this order to plaintiff and to all counsel of record.

s/
T. S. Ellis, III
United States District Judge

Alexandria, Virginia
March 15, 1996

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1098

SAM WRIGHT, JR.,

Plaintiff - Appellant,

versus

FEDERICO F. PENA, SECRETARY, DEPARTMENT OF TRANSPORTATION,

Defendant - Appellee.

No. 96-1429

SAM WRIGHT, JR.,

Plaintiff - Appellant,

versus

FEDERICO F. PENA, SECRETARY, DEPARTMENT OF TRANSPORTATION,

Defendant - Appellee.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. T.S. Ellis III, District Judge. (CA-95-1406A)

Submitted: January 28, 1977 Decided: March 5, 1997

Before HALL and MURNAGHAN, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Sam Wright, Jr., Appellant Pro Se. Marc R. Hillson, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellant appeals the district court's orders granting the employer's motion to dismiss and motion for summary judgment in Appellant's civil action filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994), and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994). We have reviewed the

record and the district court's opinions and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Wright v. Pena, No. CA-95-1406-A (E.D. Va. Mar. 15, 1996; Jan. 4, 1996). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

April 29, 1997

No. 96-1098
CA-95-1406-A

SAM WRIGHT, JR.

Plaintiff - Appellant

v.

FEDERICO F. PENA, SECRETARY, DEPARTMENT OF TRANSPORTATION

Defendant - Appellee

No. 96-1429
CA-95-1406-A

SAM WRIGHT, JR.

Plaintiff - Appellant

v.

FEDERICO F. PENA, SECRETARY, DEPARTMENT OF TRANSPORTATION

Defendant - Appellee

On Petition for Rehearing with Suggestion for Rehearing in Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc and motion for leave to file an oversized petition for rehearing were submitted to this Court. As no member of this this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

The Court grants the motion for leave to file an oversized petition for rehearing and denies the petition for rehearing and suggestion for rehearing in banc.

For the Court,

/s/ Patricia S. Connor

CLERK

Sec. 703(a) of Title VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. § 2000e-2(a) read in pertinent part:

"It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Sec. 704(a) of Title VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. § 2000e-3(a) read in pertinent part:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."

Sec. 717(a) of Title VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. § 2000e-16(a) read in pertinent part:

"All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military

departments as defined in section 102 of title 5 [United States Code], in executive agencies [other than the General Accounting Office] as defined in section 105 of title 5 [United States Code] (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."

Section 2 of the Age Discrimination in Employment Act of 1967 and 29 U.S.C. § 621 read in pertinent part:

"It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

Section 4 of the Age Discrimination in Employment Act of 1967 and 29 U.S.C. § 623 read in pertinent part:

"It shall be unlawful for an employer-(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or partici pated in any manner in an investigation, proceeding, or litigation under this chapter."

Section 15 of the Age Discrimination in Employment Act of 1967 and 29 U.S.C. § 633 read in pertinent part:

"All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed

outside the limits of the United States) in military departments as defined in section 102 of title 5 [United States Code], in executive agencies as defined in section 105 of title 5 [United States Code] (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age. Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter."

28 U.S.C. § 1746 reads in pertinent part:

"Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form: If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)".

Rule 26 of the Federal Rules of Civil Procedure reads in pertinent part:

(b)(1) "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

(b)(5) "When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."

(e) "A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."

(2) "A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."

Rule 56 of the Federal Rules of Civil Procedure reads in pertinent part:

(b) "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof."

(e) "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."